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# APPROPRIATION OF WATER IN MONTANA

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## **A BACKGROUND OF LEGAL WATER USE IN MONTANA**

Water use in Montana is generally guided by two legal principles. First, the water user is limited to diverting only that amount he can beneficially use. The second principle is known as the "prior appropriation doctrine," that is, "first in time is first in right." A person's right to a specific quantity of water depends on when the use began. The first person to use water from a source established first right, the second person could establish a right from what was left, and so on. During a dry year, for instance, the person with the earliest date of use would have first chance at the available water to the limit of his established need. The holder of the second earliest date would have next chance, and so on.

## **MONTANA WATER USE ACT OF 1973**

Legislative passage of the Montana Water Use Act of 1973 was the most comprehensive change in Montana's water right laws in the state's history. Before July 1, 1973, Montana law allowed persons to obtain water rights in three ways:

1. Filed or appropriated rights were obtained by filing public notices of intended use with the county clerk and recorder, diverting the water and putting it to beneficial use.
2. Use rights were established by simply putting the water to beneficial use. Even though they may not have been legally recorded, use rights are valid if the water user can prove the date when the beneficial use began and the amount of water used.
3. Decreed rights originated as appropriated rights or use rights and have been established by a court.

The Water Use Act of 1973 changed the water right laws significantly, not only by establishing a centralized records system, but also by providing a "permit system" for any new or additional water developments. All water rights existing prior to the passage of the act were "confirmed" by the Montana Constitution. These rights, many of them unrecorded, were to be determined through an adjudication process in state courts.

## **SENATE BILL 76**

In 1979, the Legislature passed Senate Bill 76, an Act to adjudicate claims of existing water rights in Montana. "Existing water rights" originated before the effective date of the Montana Water Use Act (July 1, 1973). State water courts were created to preside over four water divisions, for the purpose of court identification and quantification of the existing water rights "confirmed" by the Constitution. On June 6, 1979, the Montana Supreme Court issued a Water Rights Order requiring every person claiming ownership of an existing right to file a statement of claim for that right with the Department of Natural Resources and Conservation (DNRC) no later than January 1, 1982. Stockwater and domestic claims of ground water or instream flow were exempted from this process, though such claims could be voluntarily made.

After the deadline for filing claims to existing rights, the water court judges will prepare a preliminary decree with the aid of a water master. Following an opportunity for objections or appeals by all parties who may be affected by the claims, the judges will issue a final decree. On the basis of the final decree, DNRC will issue a "Certificate of Water Right" to each person decreed an existing right.

## NEW APPROPRIATIONS OF WATER

The Montana Water Use Act of 1973 requires that any new or additional developments of surface water and ground water made after July 1, 1973, be issued either a "Permit to Appropriate Water" or a "Certificate of Water Right." Both are granted by the Montana Department of Natural Resources and Conservation after processing.

### Surface Water

If you are planning construction of a new or additional diversion or impoundment, a "Permit to Appropriate Water" must be applied for and received *before* construction begins or water is diverted. The exception to this rule is small livestock reservoirs or pits not located on a perennial flowing stream (one that flows continuously at all seasons). Effective October 1, 1981, if the pit or reservoir will hold less than 15 acre-feet of water and will be located on a parcel of land larger than 40 acres, construction can begin immediately. Within 60 days of completion, an "Application for Stockwater Provisional Permit" (Form 605) must be submitted to DNRC. A provisional permit subject to prior water rights will be issued. If the reservoir has adverse effects on prior rights, DNRC can require an applicant to modify the reservoir, or revoke the permit.

Until October 1, 1981, construction on a pit or reservoir that will hold less than 15 acre-feet can begin immediately upon submitting an "Application for Beneficial Water Use Permit" (Form 600) to DNRC.

### Ground Water

*It is not necessary to apply for a "Permit to Appropriate Water" to develop wells or springs with an anticipated use of less than 100 gallons per minute. The first step is to drill the well or develop the spring. A "Well Log Report" (Form 603) is completed by the driller and sent to DNRC within*

60 days and a copy given to the well owner. When final development work is completed, the owner submits Form 602, "Notice of Completion of Groundwater Development," which is on the back of the Well Log Report, along with a filing fee to DNRC within 60 days of completion. The priority date of the water right is the date DNRC receives the completed Form 602. DNRC will review the form and issue a "Certificate of Water Right" to the owner after the certificate is recorded by the local county clerk and recorder.

If you plan development of a ground water well with an anticipated use of 100 gallons per minute or more, a "Permit to Appropriate Water" must be applied for and received before development begins.

Applications to appropriate more than 3,000 acre-feet of ground water per year may be granted only if an act of the Legislature permits the specific appropriation. *This particular law does not apply to appropriations for municipal use, public water supplies, or the irrigation of cropland owned and operated by the applicant.*

In an area designated as a *controlled ground water area*, a permit is required in all cases to appropriate ground water in any amount. At present, only one area in the state, containing portions of Prairie, Wibaux, and Fallon counties, has been designated a controlled ground water area.

## **HOW THE PERMIT SYSTEM WORKS**

The permit system requires a water user to follow the procedure described below, and illustrated in the chart on the last panel.

### **Step 1 - Completing the Application Form**

Form 600, "Application for Beneficial Water Use Permit," is available from any county clerk and recorder or your nearest water rights field of-



fice. Assistance with water right forms is also available from the field offices.

Form 600 describes the intended use, location, amount of water, and other particulars of the proposed appropriation. An application fee, based on the amount of water requested, must be sent with the application.

## **Step 2 - DNRC Review of the Application**

The date DNRC receives the original permit application will be the priority date assigned to the appropriation. This date is important when the "first in time is first in right" principle is considered.

An applicant for an appropriation of 10,000 acre-feet a year or more, or 15 cubic feet per second or more of water must clearly prove that prior water rights will not be adversely affected by the proposed appropriation.

If no adverse effects are apparent, the permit will be issued, if the following criteria are met:

1. The amount of water requested is unappropriated and available in the source throughout the period or at the times the applicant proposes to use it.
2. The proposed means of diversion or construction are adequate.
3. The proposed use of water is a beneficial use.
4. The proposed use will not unreasonably interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved.

If potential adverse effects are evident, DNRC must publish notice of the application in the local newspapers once a week for three consecutive weeks. DNRC will mail notification of the application to any known individual water users in the area who might be affected. Local water users have an opportunity to file an "Objection to Application" (Form 611) on or before the deadline specified in the published notice.

If the objections are determined to be valid and an agreement cannot be reached among all parties involved, a hearing is conducted. After

evaluation of evidence and testimony by a hearing examiner, a "Proposal for Decision" to either grant, deny, or establish conditions for the application will be issued. Written comments on the "Proposal for Decision" may be filed with the hearing examiner within 15 days. A "Final Order" will then be issued. Any appeal of the "Final Order" is made directly to the district court.

There are two more points that concern all applications for permits:

1. Any proposed appropriation of change of use that would significantly affect the quality of the human environment will require an Environmental Impact Statement (EIS). The purpose of the EIS is to inform the public and aid DNRC in its decision about the proposal. DNRC may impose an additional fee to the applicant to fund preparation of the EIS.
2. Any "Permit to Appropriate Water" issued by DNRC is *provisional*, subject to prior existing water rights and the final court determination of those rights. Developments completed according to terms of the permit will be issued a "Certificate of Water Right" when the water source is adjudicated by the water court.

### **Step 3 - Filing a Notice of Completion**

Upon receiving the permit, the next step is to construct the project, divert the water, and put it to use as outlined by the permit. A second form entitled "Notice of Completion of Water Development" (Form 617) must be filed with DNRC when the project is completed. This step is necessary before a "Certificate of Water Right" can be issued.

When an area has been adjudicated and all existing water rights listed on a final decree, rights issued by DNRC after July 1, 1973 in the form of "Permits to Appropriate Water" will be added to the decree *by priority date*. If the project has been completed and the water used according to the terms of the permit, a "Certificate of Water Right" will be issued to each permit holder. The priority date of each Certificate will be the date DNRC received the original permit application.

## **Changes in Water Use**

In order to protect all water rights, prior approval is required from DNRC for significant changes in water use of any existing water right, permit, or certificate. Such changes might include change of use or location of use, diversion, or storage. Approval from DNRC is also required prior to separating or selling all or any part of a water right from the land on which it is used.

Changes for water rights are requested on Form 606, "Application for Change of Appropriation Water Right," or Form 609, "Application to Sever or Sell Appropriation Water Right." An "Authorization to Change" must be issued by DNRC *before* the change is made.

## **Transfer of Ownership of Water Rights**

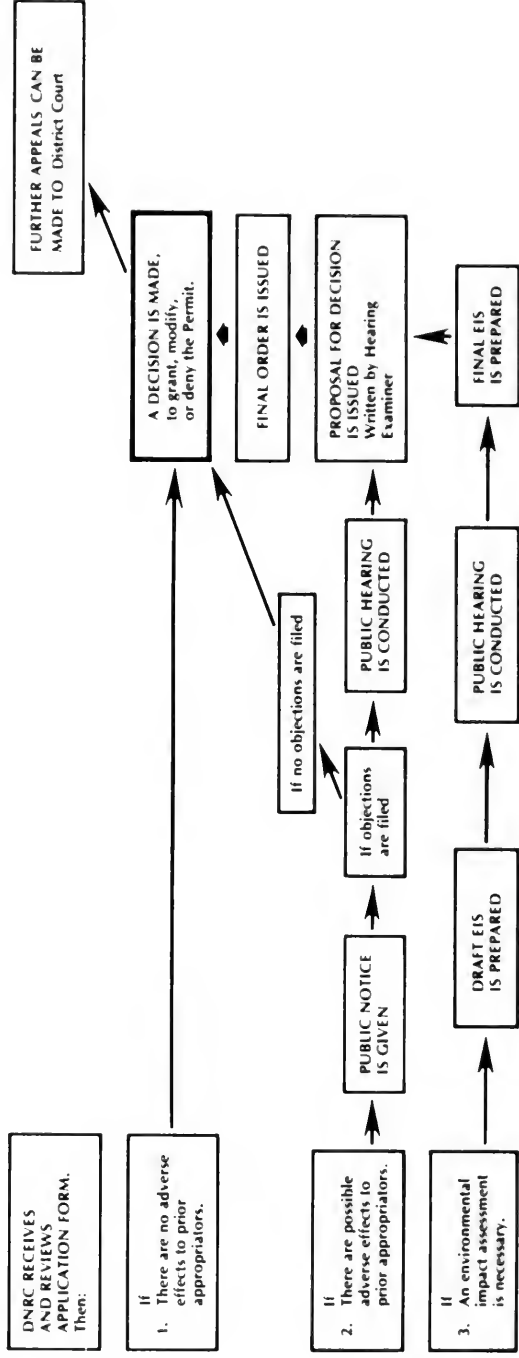
Anyone who purchases land with an associated water right must file a "Notification of Transfer of Appropriation Water Right" (Form 608) with DNRC. No prior approval or fees are required to file this form; it is for record up-dating purposes only.

## **For More Information**

Any of the water right forms required by the Montana Department of Natural Resources and Conservation are available at your local county clerk and recorder's office, or any of the Water Rights Bureau field offices in Billings, Kalispell, Lewistown, Helena, Havre, Glasgow, Missoula, Miles City, and Bozeman. Information or assistance is also available at any of the above field offices or by writing:

Montana Department of Natural  
Resources and Conservation  
Water Rights Bureau  
32 South Ewing  
Helena, MT 59620  
Phone: 406/449-3634

# HOW A BENEFICIAL WATER USE PERMIT IS RECEIVED FOR APPROPRIATIONS OF SURFACE WATER, AND GROUND WATER USES GREATER THAN 100 Gallons Per Minute.





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15,000 copies of this public document were published at an estimated cost of 7.5¢ per copy, for a total cost of \$1,130.10, which includes \$930.10 for printing and \$200.00 for distribution.



